IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 1024 OF 2004

RAFIQ SATTAR GODIL)
residing at B/180, Pushpa Nagar)
Society, Behind Jivan Jyot)
Cinema, Uddhna, Surat, Gujarat) ... PETITIONER

vs

1. THE STATE OF MAHARASHTRA)
through the Secretary to the)
Govt. of Maharashtra, Home)
Department (Special),)
Mantralaya, Mumbai 400 032.)
2. Ms. Neela Satyanarayana,)
The Principal Secretary)
(Appeals and Security),)
Govt. of Maharashtra, Home)
Department (Special),)
Mantralaya, MUMBAI 400 032)

3. THE SUPERINTENDENT OF PRISON)

The Mumbai Central Prison,)

Arthur Road, Mumbai)

4. THE SUPERINTENDENT OF PRISON)

Nasik Road Central Prison)

Nasik Road, Maharashtra.)

5. UNION OF INDIA)

6th Floor, B-Wing, Janpath)

Bhavan, Janpath, New Delhi) .. RESPONDENTS

Mr. Masood Khan for the petitioner

Mr. D. S. Mhaispurkar, APP for State

CORAM:- SMT. RANJANA DESAI &

A. S. OKA, JJ.

DATED:- 7-10-2004

ORAL JUDGMENT:-(Per Smt. Ranjana Desai, J.)

The petitioner is a friend of one Sameer Jikar Godil ("the detenu" for

convenience) who is detained by the Principal Secretary to the Government of Maharashtra, Home Department under order dated 17th March, 2004, issued under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("COFEPOSA" for short) with a view to preventing him in future from smuggling goods.

2. According to the petitioner, the order of detention, grounds of detention and the material in support thereof were served on the detenu on 31st March, 2004. However, according to the respondents the same were served on the detenu on 1st April, 2004, and he was taken in detention.

3. The grounds of detention indicate that specific intelligence was gathered by DRI officers that M/s. Aditya Recycling P. Ltd. Plot No. 216/B, G.I.D.C. Kabilpore, Navsari, Gujarat and M/s. Khaitan Textile Mills P.Ltd., Plot No. 2001 Behind Annapurna Canteen, G.I.D.C., Ankleshwar, Gujarat, both registered as 100% E.O.U. were involved in massive evasion of duty by resorting to gross misdeclaration of the weight of their export products i.e. Copper and Brass ingots. Intelligence revealed that these units are engaged in fraudulent exports of their finished goods viz. copper and brass ingots by mis-declaring the weight of the goods sought to be exported on a very higher side to the Central Excise and the Custom Authorities i.e. the weight of

goods sought to be exported under export obligations was grossly over-declared and actually exporting goods weighing much lower than what was declared on the shipping bills and other documents. Both the above firms were carrying their exports from CWC Dronagiri Node, J.N.P.T.

4. In pursuance to the information, examination was carried out by the Officers of D.R.I. Mumbai under two separate panchanamas dated 23.9.03 at Shed No. 3, CWC, Dronagiri Node J.N.P.T. in respect of three Shipping Bills of these units. The examination of the export goods revealed that in respect of one Shipping Bill, M/s. Aditya Recycling Pvt. Ltd. had carted Copper ingots weighing 1.583 MTs instead of 25.950 MTs, the weight mis-declared on the said Shipping Bill. Further, M/s. Khaitan Textile Mills Pvt.Ltd. had carted Brass Ingots weighing 2.465 Mts instead of 2.443 Mts., the weight mis-declared on one Shipping Bill and Copper ingots weighing 2.935 Mts instead of 2.020 MTs, the weight mis-declared on another Shipping Bill. Thus in all, both the firms had carted 6.983 Mts of export material, in the Docks, instead of 30.413 MTs to be actually carted in as declared on the Shipping Bills, totally valued at Rs.34,37,614/-. These goods were subsequently seized on 26.9.03 since found liable for confiscation under the Customs Act 1962.

5. During the course of investigation, statements of the detenu and co-detenu were recorded which indicated that the entire plot of illicitly diverting the duty free raw materials into the local market immediately after the import, from the factory itself and carting the export goods weighing much lower than the actual weight declared on the Shipping Bills for completion of the export obligation and illicitly diverting balance quality of finished goods to local market was a carefully thought out, well-planned and practiced modus operandi by the detenu along with his other conspirator Shri Arko Provo Roy. In the circumstances the detaining authority was of the opinion that there was preponderance of probability that the detenu might indulge in the incriminating act of smuggling the goods in future.

6. The detaining authority has stated in the grounds of detention that she was aware that the detenu had availed the bail. The detaining authority has further expressed that however, considering the detenu's activities and his propensity to indulge in smuggling activities in future, she was satisfied that the detention of the detenu under the COFEPOSA was necessary.

7. Though several grounds have been urged in the petition, Mr. Khan the learned counsel appearing for the detenu chose to argue only one of them. He contended that the detenu was arrested on 30th September, 2003, for the

alleged evasion of duty in the cases of M/s. Khaitan Textiles Mills (P) Ltd. Ankleshwar and M/s.Aditya Recycling (P) Ltd., Navasari and he was released on bail by the Sessions Court, Mumbai on 5th November, 2003. Till his detention under the impugned order of detention he was on bail in the D.R.I. Mumbai case which is the basis of the present detention order. After his release from the cases in Mumbai, he was again arrested on 19th March, 2004 by the Central Excise and Customs, Daman, Commissionerate on the allegations of diverting in the local market imports made of brass scrap, copper scrap, zinc scrap, copper ingots made by Shiv Metal Corporation, Surat and Shree Shakti International Navasari. Thus though when the impugned order of detention was passed on 17th March, 2004, the detenu was on bail in the case of D.R.I. Mumbai which is the basis of the impugned order of detention, at the time of service of the impugned order of detention, he was in judicial custody in the cases investigated by the Central Excise and Customs Daman Commissionerate. It was therefore, incumbent on the part of the detaining authority to consider before the execution of the impugned order of detention, whether it was necessary to execute it, despite the subsisting custody of the detenu in the case of Central Excise and Customs, Daman Commissionerate. Mr. Khan submitted that it was the duty of the sponsoring authorities to apprise the detaining authority about the subsisting custody of the detenu and it was necessary for the detaining

authority to consider whether preventive detention of the detenu was still necessary in spite of the detenu's subsisting custody.

8. Relying on the judgment of the Supreme Court in Binod Singh vs. District Magistrate Dhanbad, A.I.R. 1988 S.C. 2090 the learned counsel contended that non-appraisal and consequent non-consideration of the fact that the detenu was taken in custody, subsequent to passing of the order of detention has resulted in non-application of mind on the part of the detaining authority and as a result the impugned order of detention is vitiated.

9. Mr. Khan also relied on a judgments of this court in Satish Rawal v. Union of India & Ors., 1998 Cr. L.J. 4310, Riyaz Ahmed Kashmiri v. Union of India & Ors., Criminal Writ Petition No. 496 of 2000, Rameshwar Motisa Raut v. Union of India & Ors., Criminal Writ Petition No. 681 of 2001, where following Binod Singh's case a similar view is taken.

10. Mr. Mhaispurkar, learned APP contended that the affidavit of the detaining authority indicates that the detaining authority was conscious of the fact that it was necessary for her to know whether after the issuance of the order of detention the detenu was taken in custody. She was aware that this fact has a bearing on the need of executing the order of detention and hence

the detaining authority had addressed a letter to the Secretary, Government of Gujarat, Home Department, Gandhinagar requesting them that in case the detenu surrenders before the Court and is remanded to judicial custody this fact should immediately be brought to the notice of the State Government. He submitted that unfortunately this fact was not brought to the notice of the detaining authority. The detaining authority's aforementioned letter indicates that the importance of the detenu being taken in custody after issuance of the order of detention was known to her and hence the allegation of non-application of mind of the detaining authority is baseless.

11. The learned APP submitted that considering the gravity of the prejudicial activity in which the detenu is involved and the likelihood of his indulging in similar activities in future this

court should confirm the order of detention.

12. It is a fact that when the order of detention was issued, the detenu was a free agent. This is clear from the averment made by the detaining authority in the grounds of detention. It is also an admitted position that subsequent to issuance of the order and before its execution the detenu was arrested by the Central Excise & Customs, Daman Commissionerate, in case involving

massive evasion of duty by resorting to gross misdeclaration of the weight of export products.

13. The detaining authority's affidavit makes a very interesting reading. The detaining authority has stated that the sponsoring authority had received intimation from its counter-part at Daman, i.e. Additional Commissioner Preventive, Commissioner of Central Excise and Customs Daman Commissionerate that the detenu was arrested on 19th March, 2004. The said information was received by the office of the detaining authority through Fax on 2nd April, 2004. Thereafter the notice was put up by the concerned officer wherein it was mentioned that the detenu was in judicial custody and there was a possibility of getting bail as the detenu had already moved the bail application before the Sessions Court and the hearing was fixed on 5.4.2004 and this note was forwarded to the detaining authority through proper channel. However, in the meantime the detaining authority was informed by the Commissioner of Police, Surat vide letter dated 4.4.2004 that the order was executed on 1.4.2004. It is further averred in the affidavit that thus the order of detention was executed without waiting for the fresh orders from the detaining authority inspite of the fact that the detaining authority had taken precaution to inform the executing authority that in case the detenu surrenders or is remanded to judicial custody before the execution

of the order of detention the State should be informed about it. Thus in this affidavit the detaining authority has clearly admitted that the fact of subsequent arrest of the detenu and the details thereof were not made known to her. This, in our opinion, is a serious lacunae. Though it does not make the impugned detention order invalid, it makes the continued detention of the detenu thereunder invalid.

14. In Binod Singh's case (supra) the Supreme Court was considering a similar fact situation. When the order of detention was issued the detenue was a free agent but thereafter he had surrendered. The Supreme Court observed;

"In this case there were grounds for the passing of the detention order but after that the detenu has surrendered for whatever reasons, therefore, the order of detention though justified when it was passed but at the time of the service of the order there was no proper consideration of the fact that the detenu was in custody or that there was any real danger of his release. Nor does it appear that before the service there was consideration of this aspect properly. In the facts and circumstances of this case, therefore, the continued detention of the detenu under the Act is not justified."

15. We are faced with a similar situation. The fact that the detaining authority had written a letter to the Government of Gujarat requesting it to intimate to her whether the detenu is subsequently arrested or not would hardly make any difference.

16. Our attention is also drawn to the affidavit of Shri A. M. Tilak, Deputy Director, D.R.I. Mumbai. In the affidavit it is clearly admitted by the Deputy Director that there was a mistake on the part of the executing authority in executing the order of detention on the detenu while he was still in judicial custody without obtaining fresh orders from the detaining authority. It is further submitted that due to this mistake the subjective satisfaction of the detaining authority cannot stand vitiated since the detaining authority had taken all the precautions and measures as is contemplated by the law of the land.

17. We are unable to adopt such an approach. The detaining authority cannot absolve herself of her responsibility because the mistake is committed by the sponsoring authority. Whether the mistake is committed by the sponsoring authority or the detaining authority, if there is infraction of any procedural safeguard which reflects on the satisfaction of the detaining

authority, the order of detention or the continued detention thereunder will have to be set aside on that count.

18. We are also not happy with the further explanation given by the detaining authority that the detenu was arrested for offence of fraud under the Customs Act and Central Excise Act and therefore, he was likely to be released on bail and considering the propensity and potentiality of the detenu he was likely to indulge in similar prejudicial activities and, therefore, the detaining authority was about to order the execution of the order of detention.

19. In the light of Binod Singh's case (supra) we must state that the state of mind of the detaining authority at the time when the order was executed would be material. This subsequent explanation is in the nature of surmises which does not satisfy the requirement of law. In the circumstances the continued detention of the detenu under the impugned order of detention will have to be set aside. Hence the following order:

"The continued detention of the detenu Sameer Jikar Godil under detention order dated 17th March, 2004, passed by Ms. Neela Satyanarayana,

the Principal Secretary to the Government of Maharashtra, Home Department (Special) Mantralaya, Mumbai, is quashed and set aside.

The detenu Sameer Jikar Godil, is ordered to be released forthwith unless otherwise required in any other case."

(SMT. RANJANA DESAI, J.)

(A. S. OKA, J.)